



MONTANA STATE SENATE

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Department of Natural Resources and Conservation
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January 24, 2007

Dear Mary Sexton,

As a result of working as a legislator for 8 years on water issues, I believe that Montana has lost control of its water to the electrical power generation companies. This is evident by the fact that power generation water rights designed to maximize profit are being used to take water away from Montana citizens. My goal is to return that control to Montana for the benefit of all of its citizens as intended in the Constitution and state law.

For the last 6 years I have claimed that 85-1-122, MCA protects Montana's water for use by Montana's citizens by subordinating power generation water rights in the Clark Fork Basin. This statute was put in place to both allow the construction of the Cabinet Gorge Dam and protect water for irrigation and domestic use from all present and future power generation water rights in the water shed. The last sentence of the statute is: "Any present or future appropriations of water in the water shed in the state of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam." This statement defines which appropriations, the area protected and the Cabinet Gorge dam which is located in Idaho.

I recently found evidence to support my claim which is attached. Comments by Governor John Bonner, 32 Legislative Assembly, Chapter 3 stated that 85-1-122, MCA was approved by the Attorney General as legally safe-guarding Montana water for irrigation and consumptive purposes above the Cabinet Gorge dam for the entire water shed, including subsequent dams. Legislative committee notes on SB9 and county commissioner meetings also indicate that 85-1-122 applies to all subsequent dams and indicates that section 85-1-122, MCA was a condition precedent to the construction of the dams and had to expressly be accepted by the dam owners.

I have submitted my written evidence to the Code Commissioner and he has concurred with my interpretation of the statute.

I respectfully request that this oversight be corrected by providing comments on or amending Avista's water right certificates to bring them in compliance with 85-1-122.

Sincerely,

Senator Verdel Jackson

cc: Governor Brian Schweitzer, Code Commissioner Greg Petesch

SENATE JUDICIARY
Exhibit No. 21
Date 2-20-07
Bill No. SB 471

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Allocation
of funds.

Section 2. The County Commissioners of any county receiving such funds shall be, and they are, hereby authorized to allocate any portion of such funds to any school district in said county, which school district shall contain any of said lands, in such amounts as they shall determine; and any balance remaining, after allocations have been made to school districts, shall be credited to the general fund of said county.

Repealing
clause.

Section 3. All acts and parts of acts in conflict herewith are hereby repealed.

Effective
date.

Section 4. This act shall be in full force and effect after its passage and approval.

Approved January 25, 1951.

CHAPTER 2

An Act to Amend Section 1, Chapter 65, Laws of the Thirty-first Legislative Assembly, 1949, Relating to Cancellation of Record of Special Improvement District Warrants and Liability Accounts in Cities and Towns in Which Warrants or Liability Accounts Were Incurred or Issued Prior to February 25, 1929, and the Liability of Which Has Been Extinguished by Reason of Issuance of Tax Deeds, by Application of Statute of Limitations or Other Laws of the State of Montana.

Amendment of
Sec. 1, Ch. 65,
Laws of 1949.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 1, Chapter 65, Laws of the Thirty-first Legislative Assembly 1949, be, and the same is hereby amended to read as follows:

"Section 1. The City Council of any city and the town council of any town in the State of Montana is hereby authorized to cancel of record all or any Special Improvement District Liability Accounts incurred or issued prior to February 25, 1929, the liability of which has been extinguished by reason of issuance of tax deed, or by the application of the Statute of Limitations or other laws of the State of Montana."

Repealing
clause.

Section 2. All acts and parts of acts in conflict herewith are hereby repealed.

Section 3. This act shall be in full force and effect from and after its passage and approval.

Approved January 25, 1951.

CHAPTER 3

An Act Authorizing the Impounding and Restraining Within the State of Montana, the Waters of the Clark Fork River for a Distance Not Exceeding Twenty-five Miles from the Idaho-Montana Boundary Line, by a Dam Located on Said River, in the State of Idaho, and Constructed by Any Person, Firm, Partnership or Corporation Authorized to Do Business in the State of Montana, and Providing That Present and Future Appropriations of Water for Irrigation and Domestic Use in Montana Shall Have Priority Over Water for Power Use at Said Dam, and Providing That This Act Shall Take Effect Upon Its Passage and Approval.

Be it enacted by the Legislative Assembly of the State of Montana:

WHEREAS, water is one of Montana's great natural resources; and

WHEREAS, the Clark Fork River flows from Montana to Idaho; and

WHEREAS, in the future a compact may be entered into by the States and the United States for the natural resources of the Columbia River Basin; and

NOW, THEREFORE, this water resource shall be taken into consideration in such compact for allocation to Montana.

Section 1. The waters of the Clark Fork River may be impounded or restrained within the State of Montana for a distance not exceeding twenty-five miles from the Idaho-Montana boundary line, by a dam located on said river in the State of Idaho, and constructed by any person, firm, partnership or corporation authorized to do business in the State of Montana, provided, however, that any present or future appropriations of water in the water shed in the State of Montana for irrigation and domestic use above

said dam shall have priority over water for power use at said dam.

Effective
date.

Section 2. This act shall be in full force and effect upon its passage and approval.

Approved January 25, 1951.

January 25, 1951

President of the Senate
Senate Chambers
Helena, Montana

The Clark Fork River flows westerly through Sanders County, Montana, into Idaho. The Washington Water Power Company proposes to construct a dam on this River in Idaho about one mile from the Montana-Idaho boundary. This dam will back the water of the Clark Fork River through a steep mountain gorge into Montana for approximately twenty-five miles from the Idaho-Montana boundary line and will flood but a small acreage of usable land.

The Company has already agreed to make payment for the land which will be flooded by the dam and has also already agreed with the County of Sanders to pay taxes on this land on the basis of its purchase price. The Company has further agreed to take care of any additional school expense as a result of the construction of this dam.

The Federal Power Commission has issued a license to the Washington Water Power Company requiring that work begin on the dam not later than March 1, 1951 and that the first three units of the project be completed by December 31, 1952. The permit of the Federal Power Commission implies the consent of all other Federal Agencies, including the Bureau of Reclamation, for the construction of this dam. None of these agencies are opposing the construction of this project.

The Defense Power Administration of the United States has urgently recommended that the State of Montana properly take any necessary action to enable construction of this project so that it may proceed at the earliest possible date in the interest of the National Defense Program. The basis for this recommendation is stated by the Defense Power Administration to be, "necessary for

the national defense to assist in relieving critical power shortage in the Pacific Northwest."

Because many injustices have been committed in the name of National Defense due principally to the speed in which projects are consummated, and because I believe adherence to the philosophy of "Montana waters for Montana people" is of the utmost importance to the welfare of this State, I have therefore carefully scrutinized this particular legislation.

In studying Senate Bill No. 9, one must determine primarily how the proposed dam will effect Montana waters and then effect the entire State of Montana. And in this connection, the following questions are pertinent: Will the dam flood any feasible dam site in Montana or effect Power projects in Montana? How will the dam effect water for consumptive use and for irrigation in Montana?

In answer to question one, the Army Engineers' 308 Report, states that the building of the Cabinet Gorge Dam (which is the dam set forth in Senate Bill No. 9) will not flood out any feasible dam site and is considered a major project which will still allow two (2) additional dams in Montana between the Cabinet Gorge plant and the Thompson Falls dam; to-wit, the Noxon and the Trout Creek dams, both of which are proposed for construction sometime in the future.

In answer to question number two, Senate Bill No. 9 in Section One (1) thereof, specifically provides — and I quote — "that any present or future appropriations of water in the water shed in the State of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam."

It would, therefore, appear that the first question must be answered in the negative and that in answering the second question, it must be stated that the proposed dam will not effect the consumptive use of water in Montana above the dam or water for irrigation in Montana above the dam.

The quoted language found in Section One (1) of Senate Bill No. 9 was approved by the Attorney General as legally safe-guarding Montana water for irrigation and consumptive purposes above the dam. It might be argued by

some that this language does not reserve to this state water for irrigation and for consumptive use above the dam, but I agree with the Attorney General in his interpretation, for the reason that if this state has the right to grant, it certainly has the right to make reservations in that grant.

The Montana Water Conservation Board and its engineer agree that Senate Bill No. 9 will not be detrimental to the use of the Clark Fork River for power, irrigation or consumptive use above the dam.

This Legislature in enacting Senate Bill No. 9 also shows its intent of demanding an allocation of waters for Montana when and if a Compact is entered into concerning waters of the Columbia River Basin. This assertion by the Legislature, coupled with the reservations it has made in Senate Bill No. 9, clearly demonstrates that Montana has the right to claim and does claim the right to waters within the State of Montana and an interest to the waters that originate and flow out of the State of Montana. With this contention I agree and in signing and approving Senate Bill No. 9, I take the position as Governor of the State of Montana, that the State of Montana has the right to claim its waters within its borders and has the right to claim an interest in the waters originating in this state and flowing into other States or into an adjacent Nation.

Section 89-846, Revised Codes of Montana, 1947, provides in substance that no waters will be impounded in this state for the use of other states without the express approval of the Legislature of the State of Montana. It is thus obvious that no public official, board or bureau of the State of Montana, has the right to allow waters to be impounded in this state for use in another state, since this right is solely within the province of the Legislature. This is good law because such a vital resource as water should be governed solely by the duly elected agents (The Legislature) of all the people of this great State.

While it might be argued that construction of the dam involved does not come within the statutes cited, yet it is so closely related that it certainly must be construed as embraced within the meaning of that statute.

Save for Compacts, this is the first time in the history

of this state that the Legislature has asserted the right of the State of Montana to its waters within the state and an interest in the waters which originate and flow out of the state, under the statute cited.

For the reasons herein given, I have this day approved Senate Bill Number 9.

Sincerely yours,

John W. Bonner,
Governor.

CHAPTER 4

An Act to Approve, Legalize and Adopt as the Laws of Montana the Revised Codes of Montana, 1947, Prepared by the Code Commissioners Appointed by Authority of Chapter 184 of the Laws of the Twenty-ninth Legislative Assembly of Montana of 1945 and Chapter 266 of the Laws of the Thirtieth Legislative Assembly of Montana of 1947.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That the Revised Codes of Montana, 1947, in nine volumes as compiled, numbered and arranged by the code commissioners appointed by authority of Chapter 184 of the Laws of the Twenty-ninth Legislative Assembly of Montana of 1945 and Chapter 266 of the Laws of the Thirtieth Legislative Assembly of Montana of 1947, and as certified to by said code commissioners are hereby, as to both form and substance, approved, legalized and adopted as the laws of Montana now in force and effect and the same are hereby declared to constitute the laws of Montana now in force and effect except such laws as may be adopted by the Thirty-second Session of said Legislative Assembly and except such laws as were adopted by the Thirty-first Session of said Legislative Assembly.

Section 2. All changes made by said code commissioners in the language or arrangement of any law of the state now embodied in said codes and all additions of new sections made by said commissioners to said code, are hereby legalized, approved and given validity.

Revised Code of Montana of 1947, approved and adopted

Changes by code commissioners and adopted